Jalaluddin bin Ismail v Ketua Pengarah Perkhidmatan Awam, Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–264 OF 2010
RAMLY ALI, AZAHAR MOHAMEDAND BALIA YUSOF JJCA
3 MAY 2012

Administrative Law — Judicial review — Application for — Review of decision to terminate appellant's service in public interest — Whether procedural irregularity committed by respondents in termination proceeding — Whether termination rendered null and void — Whether appellant was given opportunity of being heard — Whether appellant was given full report by appellant's head of department — Whether YDPA made decision to terminate appellant's services and retire him on ministerial advice — Whether there was any illegality or irrationality found in decision — Public Officers (Conduct and Discipline) Regulations 1993 reg 49(1) & (3) — Pensions Act 1980 s 10(5)(d)

Public Servants — Contract — Contract of employment — Terms and conditions of service — Whether YDPA made decision to terminate appellant's services and retire him on ministerial advice — Whether first respondent was proper disciplinary authority — Public Officers (Conduct and Discipline) Regulations 1993 regs 3, 49(1) & (3) — Pensions Act 1980 s 10(5)(d)

The appellant was a public servant holding the post of the Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia. The Government of Malaysia ('the second respondent') had decided to terminate the appellant's service in the public interest under reg 49(3) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). The termination was conveyed to the appellant by way of a termination letter from the first respondent. The first respondent's letter also indicated that acting under s 10(5)(d) of the Pensions Act 1980 ('the Act'), the Yang di Pertuan Agong ('YDPA') had decided that the appellant retire in the public interest. The appellant claimed that the respondents' failure to comply with reg 49 of the Regulations rendered his termination null and void and of no effect. The appellant thus applied for a judicial review of the decision to terminate his employment in the public interest. By way of this application the appellant sought, inter alia, an order of certiorari to quash the decision to terminate his services in the public interest, a declaration that the termination of his services in the public interest was void, inoperative and of no effect, an order for damages for the loss incurred by the appellant as a consequence of the acts of the respondents and an order directing his reinstatement to the position he held at the time of his termination. The

A High Court judge dismissed the appellant's application for judicial review with costs and hence this appeal. In this appeal the appellant argued that if the YDPA had made the decision to terminate his services and retire him, then that decision ought to have been communicated to him by the Prime Minister and not the first respondent. As such, the appellant contended that the termination
B of his services by the first respondent was invalid as the first respondent was not the lawful disciplinary authority under reg 3 of the Regulations. The respondents referred to art 132(2A) of the Federal Constitution ('the FC'), which provided that a public officer held office during the pleasure of the YPA.
C The respondents further submitted that the first and second respondents had acted in accordance with regs 49(1) and (3) of the Regulations and that the YDPA had exercised his power on ministerial advice.

Held, dismissing the appeal with costs:

D (1) In the present case, although the relevant termination letter was under the hand of the first respondent, the letter clearly indicated that it was the second respondent, and not the first respondent or any other disciplinary authority, who had decided to terminate the appellant's service in the public interest. The first respondent's duty was only to present the full
E report from the appellant's head of department to the YDPA for the latter to decide whether the appellant's service was to be terminated in the public interest. The first respondent had strictly complied with the procedural requirements and there was no procedural irregularity committed by the respondents in the proceedings. As such, the decision
F to terminate the appellant's services in the public interest was properly exercised by the respondents as provided for under reg 49(3); and by the YDPA under s 10(5)(d) of the Act (see paras 23 & 32).

(2) The termination proceedings under reg 49 was different from any other
G form of disciplinary proceedings under the Regulations, in that, it neither provided the officer involved to be given an opportunity of being heard nor the right to avail himself of the protections and remedies available under art 135(2) of the FC. Therefore, the appellant's complaint that he had not been supplied with a copy of the report, if any or had not been
H appraised in any way of the contents of the report from the appellant's head of department upon which the second respondent was satisfied that the appellant's service should be terminated in the public interest was not supported by law (see para 25).

(3) The YPA, a constitutional monarch, is required under art 40(1) of the FC
I to act in accordance with collective or individual ministerial advice in the exercise of his functions. In the present case, the contents of the termination letter had indicated that the YDPA had exercised his power on ministerial advice and that the communication by the first respondent of the decision made by the YDPA was only indicative of a devolution of

power. Further, the termination letter stated that the appellant's eligibility for a pension would be dealt with under the Pensions Act 1980. This gave rise to a strong presumption that the YDPA had exercised his powers under reg 49 of the Regulations as well as s 10(5)(d) of the Act (see para 30).

(4) The question posed by the appellant as to whether the first respondent was the proper disciplinary authority within the definition of 'disciplinary authority' in reg 3 of the Regulations was totally irrelevant for the determination of the present case. In the present case, the termination proceeding against the appellant was initiated by the government through the first respondent, based on the full report of the appellant's head of department under regs 49(1),(2) and (3) (see paras 33 & 34).

(5) The present appeal was against the decision of the High Court in dismissing the appellant's application for judicial review. As judicial review was concerned not with the decision but the decision making process, the court was not entitled to consider whether the decision itself was fair and reasonable. Further, in exercising such power for judicial review the court ought to be mindful about not going into the substance of the decision under review, especially in cases involving administrative decisions by bodies or persons who were charged with performance of public acts or duties as in the present appeal. Based on these considerations, this court found no element of procedural impropriety, illegality or irrationality throughout the proceedings until the appellant's service was terminated by the second respondent (see para 38).

[Bahasa Malaysia summary

Perayu merupakan seorang penjawat awam yang memegang jawatan sebagai Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia. Kerajaan Malaysia ('responden kedua') telah memutuskan untuk menamatkan perkhidmatan perayu demi kepentingan awam di bawah peraturan 49(3) Peraturan-Peraturan Penjawat Awam (Kelakuan dan Tatatertib ('Peraturan-Peraturan'). Penamatan telah disampaikan kepada perayu melalui surat penamatan daripada responden pertama. Surat responden pertama juga menunjukkan bahawa bertindak di bawah s 10(5)(d) Akta Pencen 1980 ('Akta'), Yang di-Pertuan Agong ('YDPA') telah memutuskan agar perayu bersara demi kepentingan awam. Perayu menghujahkan bahawa kegagalan responden mematuhi peraturan 49 Peraturan-Peraturan menjadikan penamatannya batal dan tidak sah dan tidak mempunyai sebarang kesan. Perayu telah memohon bagi semakan kehakiman bagi keputusan menamatkan perkhidmatannya demi kepentingan awam. Melalui permohonan ini perayu memohon, antara lain, suatu perintah certiorari untuk membatalkan keputusan untuk menamatkan perkhidmatannya demi kepentingan awam, suatu deklarasi bahawa penamatan perkhidmatannya demi kepentingan awam

adalah tidak sah, tidak berkuat kuasa dan tiada kesan, suatu perintah bagi ganti rugi bagi kerugian yang ditanggung oleh perayu akibat daripada tindakan responden dan suatu perintah yang mengarahkan pengembalian semula jawatan yang dipegangnya ketika penamatannya. Hakim Mahkamah Tinggi menolak permohonan perayu untuk semakan kehakiman dengan kos dan dengan, itu rayuan ini. Dalam rayuan ini perayu menghujahkan bahawa jika YDPA telah membuat keputusan untuk menamatkan perkhidmatannya dan agar dia bersara, maka keputusan yang sepatutnya telah disampaikan kepadanya oleh Perdana Menteri dan bukan responden pertama. Oleh itu, perayu menegaskan bahawa penamatan perkhidmatannya oleh responden pertama adalah tidak sah kerana responden pertama bukanlah pihak berkuasa tatatertib yang sah di sisi undang-undang di bawah peraturan 3 Peraturan-peraturan. Responden merujuk kepada perkara 132(2A) Perlembagaan Persekutuan ('Perlembagaan'), yang memperuntukkan bahawa seorang pegawai awam memegang jawatan sepanjang diperkenan oleh YDPA. Responden seterusnya menghujahkan bahawa responden pertama dan kedua telah bertindak sejajar dengan peraturan-peraturan 49(1) dan (3) Peraturan-Peraturan dan bahawa YDPA telah menjalankan kuasanya atas nasihat menteri.

Diputuskan, menolak rayuan dengan kos:

(1) Dalam kes ini, walaupun surat penamatan yang berkaitan berada dalam tangan responden pertama, surat dengan dengan jelas menunjukkan bahawa ia adalah responden kedua, dan bukan responden pertama atau mana-mana pihak berkuasa tatatertib yang lain, yang telah memutuskan untuk menamatkan perkhidmatan perayu demi kepentingan awam. Tanggungjawab responden pertama adalah hanya untuk membentangkan laporan penuh dari ketua jabatan perayu kepada YDPA agar baginda dapat memutuskan sama ada perkhidmatan perayu harus ditamatkan demi kepentingan awam. Responden pertama telah tegas mematuhi keperluan prosedur dan tiada ketidakteraturan prosedur yang dilakukan oleh responden dalam prosiding. Oleh itu, keputusan untuk menamatkan perkhidmatan perayu dalam kepentingan awam telah dilaksanakan dengan betul sebagaimana yang diperuntukkan di bawah peraturan 49(3); dan oleh YDPA di bawah s 10(5)(d) Akta (lihat perenggan 23 & 32).

(2) Prosiding penamatan di bawah peraturan 49 adalah berbeza daripada apa-apa bentuk prosiding tatatertib lain di bawah Peraturan-Peraturan, di mana, ia tidak memperuntukkan bahawa pegawai terlibat hendaklah diberi peluang untuk didengar serta haknya kepada perlindungan dan remedi-remedi yang terdapat di bawah perkara 135 (2) Perlembagaan Persekutuan. Oleh itu, aduan perayu bahawa dia tidak pernah diberikan suatu salinan laporan, sama ada atau tidak telah dinilai dalam apa-apa cara kandungan laporan daripada ketua jabatan perayu di mana

responden kedua telah berpuas hati bahawa perkhidmatan perayu perlu ditamatkan demi kepentingan awam tidak disokong oleh undang-undang (lihat perenggan 25).

(3) YDPA, raja berperlembagaan, dikehendaki di bawah perkara 40(1) Perlembagaan Persekutuan untuk bertindak selaras dengan nasihat menteri secara kolektif atau individu dalam menjalankan fungsinya. Dalam kes ini, kandungan surat penamatan telah menunjukkan bahawa YDPA telah menjalankan kuasanya atas nasihat menteri dan komunikasi oleh responden pertama akan keputusan yang dibuat oleh YDPA adalah hanya menunjukkan penurunan kuasa. Di samping itu, surat penamatan menyatakan bahawa kelayakan perayu untuk pencen akan diuruskan di bawah Akta Pencen 1980. Ini menimbulkan anggapan yang kuat bahawa YDPA telah menjalankan kuasanya di bawah peraturan 49 Peraturan-Peraturan serta s 10(5)(d) Akta tersebut (lihat perenggan 30).

(4) Soalan yang dikemukakan oleh perayu iaitu sama ada responden pertama adalah pihak berkuasa tatatertib yang betul dalam takrif 'tatatertib berkuasa' dalam peraturan 3 Peraturan-Peraturan adalah benar-benar tidak relevan untuk pemutusan kes ini. Dalam kes ini, prosiding penamatan terhadap perayu telah dimulakan oleh kerajaan melalui responden pertama, berdasarkan laporan penuh ketua jabatan perayu di bawah peraturan 49(1), (2) dan (3) (lihat perenggan 33 & 34).

(5) Rayuan ini adalah terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu untuk semakan kehakiman. Oleh kerana semakan kehakiman tidak berkaitan dengan keputusan tersebut tetapi dengan proses membuat keputusan, mahkamah tidak berhak untuk mempertimbangkan sama ada keputusan itu sendiri adalah adil dan munasabah. Di samping itu, dalam menjalankan kuasa sedemikian bagi semakan kehakiman mahkamah sepatutnya prihatin untuk tidak melihat pada isi keputusan yang disemak, terutamanya dalam kes-kes yang melibatkan keputusan pentadbiran oleh badan-badan atau orang-orang yang telah didakwa dengan pelaksanaan perlakuan atau kewajipan awam seperti dalam rayuan ini. Berdasarkan pertimbangan ini, mahkamah mendapati tiada elemen ketidaksesuaian prosedur, penyalahan undang-undang atau ketidakrasionalan sepanjang prosiding sehingga perkhidmatan perayu telah ditamatkan oleh responden kedua (lihat perenggan 38).]

Notes

For cases on application for contract of employment, see 10 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2022–2026.

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia [1981] 2 MLJ 259 (refd)

Chief Constable of North Wales Police v Evans [1982] 3 All ER 141, HL (refd)

Hj Ariffin v Government of Pahang [1969] 1 MLJ 6; [1968] 1 LNS 45, FC (folld)

Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee [1982] 1 MLJ 68, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Rasasingam a/l Rasiah v Kerajaan Malaysia Rayuan Civil No P–75–2001, CA (refd)

T Ganeswaran v Suruhanjaya Polis Di Raja Malaysia & Anor [2005] 6 MLJ 97; [2005] 3 CLJ 302, CA (refd)

Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)

Legislation referred to

Federal Constitution arts 40(1), (1)(A), 132(1)(c), (2), (2A), 135, 135(2), 144(5A)(b)

Pensions Act 1980 ss 10(5)(d), 13

Public Officers (Conduct and Discipline) Regulations 1993 regs 3, 49, 49(1), (2), (3), (4)

Rules of the High Court 1980 O 53

Appeal from: Judicial Review No R1–25–320–2008 (High Court, Kuala Lumpur)

Karpal Singh (Zaleha Al-Hayat with him) (Karpal Singh & Co) for the appellant.
Shamsul Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Ramly Ali JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the learned High Court judge dated 9 April 2010 dismissing with costs the appellant's application for judicial review dated 4 November 2008 seeking, inter alia, for an order of certiorari to quash the decision of the termination of service of the appellant in public interest and a declaration that the purported termination of service of the appellant was wrong in law, null and void.

[2] In full, the appellant, at the stage of the High Court, sought the following reliefs, namely:

(a) an order for certiorari to quash the termination of service of the appellant in the public interest pursuant to reg 49(3) of the Public Officers

(Conduct and Discipline) Regulations 1993; and also to quash the order under s 10(5)(d) of the Pensions Act 1980 communicated to the appellant by letter dated 25 September 2008 from the first respondent;

(b) a declaration that the purported termination of service of the appellant communicated to the appellant by letter dated 25 September 2008 under the hand of the first respondent is null and void and of no effect or consequence;

(c) an order for damages and loss incurred by the appellant consequent upon the acts of the respondents;

(d) an order directing reinstatement of the appellant to the position he held at the time of the purported termination of service and any promotion he was entitled to thereafter;

(e) an order that the Deputy Registrar of High Court, Kuala Lumpur takes an account of all salaries, emoluments and other benefits the appellant is entitled to as a consequence of his termination of service;

(f) interest on the adjudged sum on such rates and for such periods deemed fit and proper by the honourable court; and

(g) costs.

THE FACTUAL BACKGROUND

[3] The appellant joined the public service on 3 May 1983. At the material time (when his service was terminated), he was holding the post of Ketua Penolong Pengarah, Institut Alam Sekitar Malaysia (EiMAS), Jabatan Alam Sekitar and was a public servant within the provisions of art 132(1)(c) of the Federal Constitution.

[4] The appellant's service was terminated with effect from 24 October 2008 by a letter dated 25 September 2008 under the hand of the first respondent (Ketua Pengarah Perkhidmatan Awam Malaysia). The said letter, inter alia, was to the effect that the Government had decided to terminate the appellant's service in the public interest under reg 49(3) of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'). It was also indicated in paragraph two in the said letter that acting under s 10(5)(d) of the Pensions Act 1980, the Yang di-Pertuan Agong has decided that the appellant retires in the public interest. For case of reference, the full text of the said letter is reproduced below:

ENCIK JALALUDDIN BIN ISMAIL

(No. K/P: 590729-10-6233)

Melalui dan salinan:

Ketua Pengarah Alam Sekitar

Jabatan Alam Sekitar Malaysia

Kementerian Sumber Asli & Alam Sekitar

Aras 3, Podium 3, Wisma Sumber Asli

No. 25, Persiaran Perdana, Presint 4

62574 W.P. PUTRAJAYA

Tuan,

Adalah saya memaklumkan bahawa Kerajaan telah memutuskan untuk menamatkan perkhidmatan tuan demi kepentingan awam di bawah Peraturan 49(3), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuat kuasa *24 Oktober 2008*.

2. Pada menjalankan kuasa di bawah seksyen 10(5)(d), Akta Pencen 1980, Seri Paduka Baginda Yang di-Pertuan Agong telah memutuskan bahawa tuan dikehendaki bersara demi kepentingan awam. Tarikh kuat kuasa persaraan itu ialah pada *24 Oktober 2008*.

3. Tuan boleh mengambil dan menghabiskan kesemua cuti rehat yang tuan layak sebanyak *16 hari* bermula pada *30 September 2008*. Urusan pencen tuan akan diuruskan mengikut Akta Pencen 1980.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

tt.

(TAN SRI ISMAIL ADAM)

Ketua Pengarah Perkhidmatan Awam

Malaysia.

[5] The appellant contended that the termination of his service is null and void and of no effect. The appellant then applied for judicial review under O 53 of the Rules of the High Court 1980. On 9 April 2010 the High Court dismissed his application with costs of RM10,000 to the second respondent. Dissatisfied with the decision, the appellant appealed to the Court of Appeal. Hence the present appeal.

AT THE COURT OF APPEAL

[6] The appellant raised sixteen grounds in his memorandum of appeal before us. For ease of reference all the grounds can be summarised into three main issues, namely:

(a) whether the respondents had complied with reg 49 of the 1993

Regulations failing which will render the termination null and void and of no effect (grounds 1, 2, 3, 4, 5, 9, 11, 12, 14,15 and 16) (first issue);

(b) whether the first respondent is the authority to convey the decision of the Yang di-Pertuan Agong (grounds 6, 7 and 13) (second issue); and

(c) whether the first respondent is the proper disciplinary authority within the definition of 'disciplinary authority' in reg 3 of the 1993 Regulations (grounds 8 and 10) (third issue).

THE APPELLANT'S CONTENTIONS

[7] Learned counsel for the appellant argued that before the appellant's service could be lawfully terminated under reg 49(3) of the 1993 Regulations, there must be strict compliance with the provisions of reg 49(1)–(2), the fulfillment of which was a condition precedent to any action under reg 49(3); and the decision — making process in relation to the termination of service in the provisions of reg 49 had to be complied with failing which the court had the jurisdiction to declare the termination unlawful and invalid.

[8] In relation to the above issue, the appellant further contended that:

(a) the letter dated 25 September 2008 (informing him of the termination) is null and void, and no effect as there is no indication in the said letter at all that the provisions of reg 49(1)–(2) have been complied with; there is no indication whatsoever of the grounds of the second respondent's satisfaction in relation to the appellant's work and conduct or in anyway whatever that it was desirable in the public interest to terminate the appellant's service; in any event the said letter only adverts to reg 49(3);

(b) the appellant has not been supplied a copy of the report, if any, or had been appraised in any way otherwise of the contents of the report from the appellant's head of department upon which the second respondent was satisfied that the appellant's service should be terminated in the public interest in contravention of the rules of natural justice;

(c) there was no basis for the second respondent to terminate his service because in the course of his employment he had not at any time been disciplined in relation to his conduct or his work being unsatisfactory or in being anyway blameworthy in the course of his employment; he has been bestowed several decorations in 1997, 1999 and 2001; the termination of his service in the public interest has not been properly effected and consequently the action of the Yang di-Pertuan Agong requiring him to retire from the public service under s 10(5)(d) of the

Pensions Act 1980 is unsupportable in law as the Yang di-Pertuan Agong could not have had any material before him to act under the provisions of the said section;

(d) the communication by the first respondent of the act of the Yang di-Pertuan Agong requiring the appellant to retire in the public interest is not supportable in law as the first respondent is not the authority, in law, to convey the decision of the Yang di-Pertuan Agong;

(e) the appellant has been subjected to abuse of power and mala fides as he was isolated and accorded no work from January 2005 right up to the date of his termination — these evidence of abuse of power and mala fides would render his termination of service in the public interest null and void and of no effect; and

(f) there has been contravention of the provisions of art 144(5A) proviso (b) of the Federal Constitution in that the first respondent was not the lawful disciplinary authority within the meaning of 'disciplinary authority' in reg 3 of the 1993 Regulations.

[9] The appellant also queried 'on whose advice did the Yang di-Pertuan Agong act on' in exercising the power under s 10(5)(d) of the Pensions Act 1980 in terminating his service in the public interest. The appellant submitted that if it was the Yang di-Pertuan Agong who made the decision to terminate, then the termination of the appellant ought to have been communicated by the Prime Minister and not by the first respondent.

THE RESPONDENT'S CONTENTIONS

[10] The learned senior federal counsel for the respondents, referred to art 132(2A) of the Federal Constitution which provides that a public officer holds office during the pleasure of the Yang di-Pertuan Agong. To strengthen his submission on this point, learned senior federal counsel referred to the decision of the Federal Court in the case of *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee* [1982] 1 MLJ 68 wherein Salleh Abas FJ (as he then was) said, inter alia:

> The law relating to civil service in Malaysia is based upon a twin principle that every employee holds office during the pleasure of the Yang di-Pertuan Agong and that the qualifications for appointment and conditions of service are regulated by him, in addition and subject to any law on the same subject matters having been made by the Parliament.

[11] The respondents also submitted that it is the Yang di-Pertuan Agong who is the authority to decide whether the appellant's service is still required or should be terminated in public interest under reg 49(1) and (3) of the 1993

Regulations, based on the report and recommendation made by the head of department; the first respondent's duty is to forward a memorandum to present the relevant report for the Yang di-Pertuan Agong's consideration; therefore the first respondent has acted in accordance with reg 49(1)–(3) of the 1993 Regulations.

THE DECISION OF THIS COURT

[12] The present appeal revolves mainly on the interpretation of reg 49 of the Public Officers (Conduct and Discipline) Regulations 1993 (the 1993 Regulations) which reads as follows:

> Termination in the public interest
>
> 49.
>
> (1) Notwithstanding any provision in these Regulations, where the Government finds or where representations are made to the Government that it is desirable that the service of an officer be terminated in the public interest, the Government may call for a full report from the Head of Department in which the officer is or has been serving.
>
> (2) The report referred to in sub regulation (1) shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.
>
> (3) if, after considering the report received under the sub regulation (1), the Government is satisfied that, having regard to the conditions of the service, the usefulness of the officer to the service, the work, the conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate the service of the officer with effect from such date as the Government shall specify.
>
> (4) It shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of these Regulations; and the Government may so terminate the service of such officer.
>
> (5) Notwithstanding anything in these Regulations and any other law to the contrary, in terminating the service of any officer in the public interest under the regulation, such officer may not be given any opportunity of being heard and an officer whose service has been terminated in the public interest under this regulation shall not for the purpose of Article 135(2) of the Federal Constitution, be regarded as having been dismissed, regardless of whether such termination of the service of the officer involved an

element of punishment or was in connection with conduct in relation to his office which the Government regards as unsatisfactory or blameworthy.

[13] The 1993 Regulations were made by the Yang di-Pertuan Agong pursuant to art 135(2) of the Federal Constitution, which reads:

(1) …

(2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by federal law and, subject to the provisions of any such law, by the Yang di-Pertuan Agong; and the qualifications for appointment and conditions of service of persons in the public service of any State may be regulated by State law and, subject to the provisions of any such law, by the Ruler or Yang di Pertua Negeri of that State.

[14] In short, art 132(2) provides that the qualifications for appointment and conditions of service of persons in the public services may be regulated by federal law and subject to the provisions of any such law, by the Yang di-Pertuan Agong. Regulation 49 of the 1993 Regulations is one of the regulations governing the conditions of service of persons in the related public services particularly on termination in the public interest.

[15] Article 132(2A) of the Federal Constitution provides that a public officer holds office during the pleasure of the Yang di-Pertuan Agong. The said art 132(2) reads:

(2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (f) and (h) of Clause (1) holds office during the pleasure of the Yang di-Pertuan Agong and except as expressly provided by the Constitution of the State, every person who is a member of the public service of a State holds office during the pleasure of the Ruler or Yang di Pertua Negeri.

[16] The Federal Court's decision in the case of *Hj Ariffin v Government of Pahang* [1969] 1 MLJ 6; [1968] 1 LNS 45 is a clear authority on the principle that every member of the public service holds office during the pleasure of the Yang di-Pertuan Agong or Ruler of State (as the case may be). In that case, Raja Azlan Shah J, (as His Majesty then was) expressed:

Article 132(2A) has, subject to exceptions expressly provided by Federal and State Constitutions, adopted the English common law that every person who is a member of the public service of the Federal or of a State Government holds office during the pleasure of the Yang di-Pertuan Agong or the Ruler or Governor as the case may be.

The express exceptions are clearly embodied in art 135 which put a check on the unabridged exercise of pleasure. The pleasure of the Yang di-Pertuan Agong, or the Ruler or Governor, would still be there, but it has to be exercised in accordance with the statutory obligations of art 135, and it is the breach of these obligations that afford a cause of action. If the termination of service does not violate the provisions of art 135, this court is not competent to quash an order terminating the service under item 1 of the First Schedule to the Courts Judicature Act 1964.

[17] Regulation 49 of the 1993 Regulations talks about termination of service in the public interest. The authority who has the power to terminate the service of an officer under the said regulation is the Government of Malaysia — the second respondent in the present appeal. In the Federal Court case of *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia* [1981] 2 MLJ 259, the Government of Malaysia had decided to terminate the Appellant's service in the public interest under s 10(d) of the Pensions Ordinance and General Order 44; and the termination was conveyed to the appellant by the Director of Public Services. The appellant brought an action for a declaration that the termination of his service in the public interest was void, inoperative and of no effect. One of the grounds of appeal in that case was that the requirement for the appellant to retire from the public service on the termination of his employment in the public interest could only be exercised by the Yang di-Pertuan Agong as required and not by the Government of Malaysia as intimated by the Director of Public Services and accordingly vitiated the exercise of the power under the statutory provisions.

[18] In his judgment, Abdoolcader J (as he then was) said as follows:

[19] … The Yang di-Pertuan Agong is a constitutional monarch and is required under art 40(1) of the Constitution in the exercise of his functions (except on certain matters that do not concern this appeal) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Teh Cheng Poh alias Char Meh v Public Prosecutor, Malaysia* [1979] 1 MLJ 50; [1980] AC 458 (at pp 466–473). In view of this, the reference to the second respondent in the letter in question is not more than a loose use of the term to encapsulate the decision of the Yang di-Pertuan Agong for the purposes of s 10 of the Pensions Ordinance and this view is reinforced by the proper presumption that can be made in this respect by the reference in the letter of 13 October 1971 of the termination having been effected under s 10(d) of the Pensions Ordinance which specifically refers to the power of the Yang di-Pertuan Agong to require an officer to retire from the public service on the termination of his employment in the public interest. Section 10 of the Pensions Ordinance must be read in the light of s 8 thereof, sub-s (1) of which provides that no pension shall be granted under the Ordinance to any officer until he shall have retired from the public service and sub-s (2) whereof is in like terms

as s 10 of the Ordinance in prescribing that no pension shall be granted to any officer who has retired from the public service otherwise than as specified therein. Further support for the presumption of the Yang di-Pertuan Agong's exercise of his power on ministerial advice again appears in the letter of 13 October 1971 which goes on the state that the question of the appellant's eligibility for a pension would be dealt with under the Pensions Ordinance and also in the subsequent letter of 5 May 1972 indicating that when approval as to the appellant's pension factor was received action would be taken for the pension to be paid to him.

[21] When we speak of the Government, we refer to His Majesty's Government which includes His Majesty the Yang di-Pertuan Agong and of which he is the constitutional head. The reference therefore to the second respondent in the letter of 13 October 1971 is sufficiently comprehensive to manifest the Yang di-Pertuan Agong's participation in the decision made and would appear to be no more than a composite term to intimate the exercise by the Yang di-Pertuan Agong of his powers under s 10 of the Pensions Ordinance on ministerial advice, and the communication by the first respondent of the decision so made by the second respondent is only indicative, to use the words of Brightman J, in *In re Golden Chemical Products Ltd* [1976] Ch 300 (at p 307), 307 applying the law as explained by Lord Greene MR, in *Carltona, Ltd v Commissioners of Works & Ors* [1943] 2 All ER 560 (at p 563), 563 of 'a devolution of power — delegation is the wrong word'. In *Lim Lian Geok v The Minister of the Interior, Federation of Malaya* [1964] MLJ 158 it was accepted before the Privy Council that a notice of intended deprivation of citizenship was not in any way invalid because it was signed by the Registrar-General of Citizens and the contention that there had been a delegation by the Minister was abandoned; these were points of argument taken unsuccessfully in the courts below.

[22] We cannot but reject in the circumstances the argument advanced that the Yang di-Pertuan Agong did not in fact require the appellant to retire from the public service on the termination of his employment in the public interest under s 10(d) of the Pensions Ordinance.

[23] In any event, even assuming for a moment for the sake of argument that the termination of the appellant's service involves any punitive element or can be impugned on the basis of the contentions advanced, but we find it does not and cannot, the position is covered by the further proviso inserted in art 135(2) of the Constitution on 31 December 1978 and made effective retrospectively as from 31 August 1957 to the effect that the termination of the service of a public officer in the public interest does not constitute dismissal on the grounds relied on by the appellant. This proviso would accordingly, if the appellant had any just cause for complaint, deprive him of any relief or remedy.

[19] In the present case, the relevant termination letter dated 25 September 2008, at para (1) clearly indicates that it was the Government who had decided

to terminate the appellant's service in the public interest pursuant to reg 49(3) of the 1993 Regulations: 'Adalah dimaklumkan bahawa kerajaan telah memutuskan untuk menamatkan perkhidmatan tuan demi kepentingan awam di bawah Peraturan 49(3), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 berkuat kuasa 24 Oktober 2008.'

[20] Eventhough the said letter was signed by one Tan Sri Ismail Adam (the first respondent in the present appeal), it did not invalidate the decision to terminate the service of the appellant. The decision was not his decision. The decision was properly made and the power to terminate was properly exercised by the Government as provided for under reg 49(3); and by the Yang di-Pertuan Agong under s 10(5)(d) of the Pensions Act 1980.

[21] The termination proceedings under reg 49 can be initiated by the Government itself or through representations made to the Government: 'where the Government finds or where representations are made to the Government'. The findings or the representations made to the Government must relate that 'it is desirable that the service of an officer be terminated in the public interest'. That is the starting point for a proceeding to be initiated under reg 49.

[22] Once the Government has entertained such a finding or representation, the next procedural step to be done is for the Government to call for a full written report from the head of department in which the officer is or has been serving. The said report shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the head of department.

[23] The Government may terminate the service of the officer if the Government is satisfied it is desirable in the public interest so to do, after having regard to the conditions of the service, the usefulness of the officer to the service, the work and the conduct of the officer and all other circumstances of the case. The termination may take effect from such date as the Government shall specify. The satisfaction relates to the satisfaction of the Government. It is for the Government to decide on the desirability of the termination. The Government is not legally obliged to give reason to any party as to what considerations have fulfilled its satisfaction or what is the degree of its satisfaction. In the present case, the letter dated 25 September 2008 clearly indicates that it was the Government (the second respondent) who had decided to terminate the service of the appellant, not the first respondent, or any other disciplinary authority. Thus, the requirements for 'satisfaction' and termination of the service as required under reg 49 of the 1993 Regulations had been complied with. There is no procedural irregularity committed by the respondents in the proceedings.

[24] The disciplinary authority has no effective part to play in the

proceedings. It has no active role — except, as provided under reg 49(4) of the 1993 Regulations which reads: 'it shall be lawful for the appropriate disciplinaryauthority to recommend to the government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of the Regulations'. The recommendation of the disciplinary authority is not mandatory in all cases. The Government may decide on its own even without any recommendation from the disciplinary authority. The Government is not legally bound to follow whatever recommendation made by the disciplinary authority. This is just to stress that the role of the appropriate disciplinary authority in the subject matter is very minimal.

[25] The termination proceeding under reg 49 is different from any other forms of disciplinary proceedings under the 1993 Regulations. Unlike any other forms of disciplinary proceedings, the termination proceedings under reg 49 provides no right to the officer involved to be given opportunity of being heard and the said officer in question whose service has been terminated in the public interest under reg 49 shall not for the purpose of art 135(2) of the Federal Constitution be regarded as having been dismissed, regardless of whether such termination of the service of the officer involved an element of punishment or was in connection with conduct in relation to his office which the Government regards as unsatisfactory or blameworthy. This is clearly provided for in reg 49(5) of the Regulations. That being the case, all the protections and remedies available under art 135 of the Federal Constitution is not applicable and not available to an officer whose service is being terminated in the public interest under reg 49, as in the present case. Therefore, the appellant's complaint that he has not been supplied with a copy of the report, if any or had not been appraised in any way otherwise of the contents of the report from the appellant's head of department upon which the Government was satisfied that the appellant's service should be terminated in the public interest, cannot hold water and not supported by law.

[26] Section 10(5)(d) of the Pensions Act 1980 talks about 'retirement' of any public officer from the public service on the ground that the officer's employment has been terminated in the public interest which must have been done by the Government under reg 49 of the 1993 Regulations. Section 10(5)(d) of the Act reads as follows:

> (5) The Yang di-Pertuan Agong, in the case of a federal officer or a local federal officer, or the State Authority, in the case of a state officer, may require any officer to retire from the public service —
>
> (d) on the ground that the officer's employment has been terminated in the public interest.

The power under s 10(5)(d) is to be exercised by the Yang di-Pertuan Agong, in

the case of a federal officer. 'Retirement' under s 10(5)(d) is to facilitate granting of pension payment to the officer in question. It empowers the Yang di-Pertuan Agong to request any public officer to retire from the public office on the ground that the officer's employment has been terminated in the public interest. Before the powers under s 10(5)(d) can be invoked the service of the officer in question must has been first terminated by the Government. In the unreported Court of Appeal case of *Rasasingam a/l Rasiah v Kerajaan Malaysia* (Rayuan Sivil No P-01–75 Tahun 2001) the Court of Appeal said, inter alia, that 'in any event, the word 'may' in the main part of s 10(5), in the context of its use in that section, imports an element of empowerment or enabling rather than a discretion'.

[27] An officer whose service has been terminated in the public interest under reg 49 of the 1993 Regulations can only be accorded payment of pension after he has been required to retire in the public interest by the Yang di-Pertuan Agong under s 10(5)(d) of the Pensions Act 1980. Only then pension can be granted to him by the Yang di-Pertuan Agong under s 13 of the same Act which provides:

> Retirement in the public interest
>
> 13. The Yang di-Pertuan Agong may, if he thinks fit, grant a pension, gratuity or other benefit to an officer who is retired under paragraph 10(5)(d) or paragraph 10(5)(f), but the amount shall not exceed that for which such officer would be eligible had his pension, gratuity or other benefit been calculated based on his actual length of reckonable service.

[28] Again, the granting of such a pension is not an absolute right to the officer. It is granted at the discretion of the Yang di-Pertuan Agong 'if he thinks fit'. The officer in question will not be eligible to be granted pension if he is not required to retire under s 10(5)(d) of the Pensions Act 1980.

[29] The appellant also raised the issue that if it was the Yang di-Pertuan Agong as the authority exercising the power under reg 49 of the 1993 Regulations as well as s 10(5)(d) of the Pensions Act 1980, then the Yang di-Pertuan Agong under the circumstances would not be acting in his personal capacity but on executive advice pursuant to art 40(1A) of the Federal Constitution. The appellant queried on whose advice did the Yang di-Pertuan Agong act on since there is nothing in the affidavit of the first respondent to reflect this. The appellant also submitted that if it was the Yang di-Pertuan Agong who made the decision to terminate the service and to retire the appellant then the said decision ought to have been communicated by the Prime Minister and not by the first respondent.

[30] The Yang di-Pertuan Agong is a constitutional monarch and is required

under art 40(1) of the Federal Constitution in the exercise of his functions to act in accordance with collective or individual ministerial advice, (see *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia and the Government of Malaysia*; and *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50). The reference therefore to the second respondent (the Government) in the letter of termination dated 25 September 2008 is sufficiently comprehensive to manifest the Yang di-Pertuan Agong's participation in the decision made. The contents of the said letter sufficiently indicate that the Yang di-Pertuan Agong had exercise his power on ministerial advice; and the communication by the first respondent of the decision so made by the Yang di-Pertuan Agong is only indicative of 'a devolution of power' — the term aptly used by Abdoolcader J in *Balakrishnan*'s case. Further support for the presumption of the Yang di-Pertuan Agong's exercise of his power on ministerial advice also appears in the termination letter dated 25 September 2008 which states that the appellant's eligibility for a pension would be dealt with under the Pensions Act 1980: 'Urusan pencen tuan akan diuruskan mengikut Akta Pencen 1980'. (The same line of presumption was also adopted by the Federal Court in *Balakrishnan*'s case.)

[31] Based on the above mentioned authorities, we are satisfied that there are strong presumptions that the Yang di-Pertuan Agong had exercised his powers under reg 49 of the 1993 Regulations as well as s 10(5)(d) of the Pensions Act 1980, on ministerial advice. The first respondent, by virtue of his post as the Director-General of Public Services whose duty is to call for and to receive any representation and to obtain full report from the appellant's head of department, and later to present them to the Yang di-Pertuan Agong for His Majesty's consideration and assent, is therefore also the same person who would notify the appellant of the decision of the Yang di-Pertuan Agong on the matter. We are of the view that the role of the first respondent is purely administrative in nature and it does not in any way render the termination of the appellant's service invalid. The appellant's contention that the Prime Minister should be the authority to convey the decision of the Yang di-Pertuan Agong therefore lacks merit.

[32] In the present case, the first respondent had strictly complied with the procedural requirements under reg 49 of the 1993 Regulations. He had called for full report from the appellant's head of department; received the full report submitted by the head of department; prepared his report on the matter; and the reports were presented to the Yang di-Pertuan Agong for His Majesty's consideration and assent for termination of the appellant's service in the public interest. The first respondent's duty is only to present the full report to the Yang di-Pertuan Agung. He is not the authority who decides on the contents of the report. Instead, the report and the recommendation were prepared by the appellant's head of department. It is the Yang di-Pertuan Agong who is the

authority to decide whether the appellant's service is to be terminated in the public interest or not under reg 49 of the 1993 Regulations. There is no requirement under reg 49 that the appellant's statements be part of the contents of the reports presented to the Yang di-Pertuan Agong. Also, there is no requirement in law that the appellant be given a copy of the said reports before they were presented to the Yang di-Pertuan Agong.

[33] The appellant finally raised the issue whether the first respondent is the proper disciplinary authority within the definition of 'Disciplinary Authority' in reg 3 of the 1993 Regulations. We note that this issue is not really relevant for consideration in the present appeal. It is not in dispute that the termination of the appellant's service in the public interest was made under reg 49 of the 1993 Regulations; and for that matter he was required to retire by the Yang di-Pertuan Agong under s 10(5)(d) of the Pensions Act 1980. Substantively, the appropriate disciplinary authority has no active role to play in the proceeding under reg 49. The basic procedures under reg 49(1) and (3) do not involve the role of an appropriate disciplinary authority. The preparation of full report containing particulars relating to the work and conduct of the officer and comments are made by the head of department; presented to the Yang di-Pertuan Agong by the first respondent as the Director-General of Public Services for His Majesty's consideration and assent. The role of the appropriate disciplinary authority is very minimal and not mandatory, as stated in reg 49(4) — to the effect that 'it shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings have not been carried out under any of the provisions of the Regulations; and the government may so terminate the service of such officer'.

[34] In the present case, as a matter of fact the termination proceeding against the appellant was not initiated by the appropriate disciplinary authority under reg 49(4). In fact, the proceeding was initiated by the Government (through the first respondent) based on the full report of the appellant's head of department under reg 49(1)–(3) of the 1993 Regulations. Therefore, the question posed by the appellant as to whether the first respondent was the proper disciplinary authority within the definition of 'disciplinary authority' in reg 3 of the 1993 Regulations, is totally irrelevant for the determination of the present case.

ON JUDICIAL REVIEW

[35] The present application came to the court by way of judicial review. The appeal before us is against the decision of the High Court in dismissing the appellant's application for judicial review. Generally, judicial review is not an appeal from a decision, but a review of the manner in which the decision was

made and therefore the court is not entitled on an application for judicial review to consider whether the decision itself was fair and reasonable. In short, judicial review is concerned not with the decision, but with the decision making process (see *T Ganeswaran v Suruhanjaya Polis Di Raja Malaysia & Anor* [2005] 6 MLJ 97; [2005] 3 CLJ 302 — Court of Appeal; *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141).

[36] We are also made aware of the decision of the Federal Court in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, where it was held that a decision susceptible to judicial review is not only open to challenge on the ground of procedural impropriety but also on the grounds of illegality and irrationality; and in practice this permits the courts to scrutinise such decisions not only for process, but also for substance.

[37] However, in exercising such power for judicial review the court must be mindful that the court should be slow and cautious in going into the 'substance' of the decision under review, especially in cases involving administrative decision by bodies or persons who are charged with performance of public acts or duties (as in the present appeal). The following statements by Edgar Joseph Jr FCJ, in *R Rama Chandran*'s case itself can be good guidance:

> It must be remembered that we are here concerned with an appeal which arises from judicial review proceedings whose target was an award of the Industrial Court, an inferior court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said, therefore, that by intervening in the manner which we propose to do, and we would be trespassing into the domain of the executive, thus violating the doctrine of the separation of powers, and so acting undemocratically.

THE CONCLUSION

[38] Based on the above considerations, we are satisfied that the procedural provisions under reg 49(1)–(2) of the 1993 Regulations have been strictly complied with by the Government before the appellant's service was terminated in the public interest under reg 49(3) of the said Regulations and before the Yang di-Pertuan Agong required him to retire in the public interest under s 10(5)(d) of the Pensions Act 1980. We find no element of procedural impropriety, illegality or irrationality throughout the proceedings until the appellant's service was terminated by the Government. We also find that the learned High Court judge was correct in dismissing the appellant's application for judicial review. We find no reason to interfere either procedurally or substantively. The decision of the learned High Court judge is hereby affirmed.

[39] We therefore dismiss the appeal with costs of RM5,000 to the respondents. We make an order that the deposit be paid to the second respondent on account of costs.

Appeal dismissed with costs.

Reported by Kohila Nesan